finds expression in the wisdom which characterizes the decision of the great judge and distinguishes him from his inferior brethren.

To those who have not passed beyond the Blackstonian concept of a law which has always existed and which needs only to be discovered by the diligent judge, this book may seem to exhibit radical tendencies. To others it will seem no more radical than science itself which seeks always by the gathering of data and their accurate interpretation to penetrate a little nearer to the ultimate truth. In this sense the book is truly scientific in spirit and method, presenting its subject with the balance, restraint and clarity which have marked the author's distinguished service as a judge.

HARLAN F. STONE.

COLUMBIA LAW SCHOOL

THE SPIRIT OF THE COMMON LAW. By ROSCOE POUND, Carter Professor of Jurisprudence in Harvard University. Boston: MARSHALL JONES COMPANY. 1921. pp. xiv, 224.

This is a book concerning the law,—not a law book, and between the two there is a significant difference. Most law books are only trade tools; the practitioner as far as possible, reads them by deputy; laymen would as soon mull over the digests themselves, for which most textbooks are merely syllabi. But books about the law (or the best of them) offer opinions as to why digests exist; of the origin of judicial motives generating intent and producing decisions; of influences for change, whether secular or sporadic, and above all of the vigor or decadence of actual legal conditions.

It is no accident that for centuries the philosophy of law was an academic study, allied with, if not numbered among the liberal arts; that Grotius was never in our sense a lawyer, or that Blackstone addressed his commentaries, not to the bar at which he almost failed, but to "Mr. Vice-Chancellor and Gentlemen of the University,"—of Oxford.

Only from books about the law, from writers who view courts and judges, advocates and attorneys, as merely the temporary interpreters of a continuing entity greater than themselves, can anyone acquire knowledge of why law ever was, why it is, and what it may be. A busy bench and bar usually fail to see the forest on account of the trees. Of course every lawyer worthy the name must have enough of such knowledge to give him zest in handling his tools; he gets it young, and it is a reproach to our profession, that most of us having absorbed one set of concepts concerning legal origins, aims and limitations in our salad days, thereafter remain static, and are both surprised and angry, if in later life we discover that younger men at the bar, and most men beyond it, do not share and rather look down upon what on fair investigation we ourselves recognize as no more than the style of teaching *about* the law current in our youth.

Dean Pound is assuredly well entitled to speak for what might be called the decanal school of interpretative legal comment, now dominant in the law schools whose graduates are fast forming the majority of the American bar; and for that reason it is perhaps the more significant, that it is by the lectures here reprinted, and delivered before the laymen of a college town (Dartmouth) he has chosen to put into a form as popular as the subject permits, the spiritual essence of that sociological jurisprudence, which he and many other professors have been preaching and teaching for about a quarter century.

They have so completely made Blackstone anathema that an inquisitive occasional lecturer has of late years been unable to discover any knowledge of the commentator's once famous definition of common law, among the student hearers at

four leading universities. Having apparently destroyed that long-accepted form of words, it is interesting to note what Dean Pound means by that, of which he studies the spirit.

For him it is no more than a mode of juristic thinking, a method of treating legal problems according to that "Anglo-American legal tradition, which we call the common law." The ultimate meaning of this total abandonment of Bacon's (and others') caution that the duty of judges is *jus discere* and not *jus dare,* is that the common law is judge-made law, provided it be fashioned with reasonable deference (perhaps only lip-service) to tradition, but with keen attention to the social voices of the time.

Thus it is the judicial spirit while making law, and that spirit both past and present with which these lectures deal; and in so far as they are at all dogmatic, they may be summed up, by comparing what Dean Pound says to-day with what the future Justice Holmes said in 1881, when at the Lowell Institute he gave the addresses known as "The Common Law." Mr. Holmes suggested that

> "The considerations which judges rarely mention, and always with an apology, are the secret rules from which the law draws all the juices of life. I mean of course considerations of what is expedient for the community concerned."

The present lecturer can and does sum up the judicial duty of decision by saying that the jurists of to-day (and judges are presumably jurists) are content to seek the jural postulates of the civilization of the time,—a phrase extremely easy of translation into keeping one's ear to the ground to hear the tramp of insistent crowds. What Holmes whispered as a secret in 1881, Pound proclaims as a commonplace in 1921.

But except by implication the lecturer is rarely dogmatic, and his analysis of the sources of the American legal and judicial tradition is something nowhere else done with such brevity and completeness, and so much humour. Any intelligent reader must recognize the genuine learning necessary for every page; but a learned book garnished with excerpts from Mark Twain, and McChord Crothers is as unusual as it ought to be attractive.

It is of course impossible for any man who strongly believes in theories thought to be gaining ground, but not yet fully accepted, sympathetically to outline and measure influences making against what he longs for. Hence "liberty and the rights of man," as evolved by the eighteenth century advocates of natural law, as written into American constitutions, and expounded in terms of adulation by generations of bar and bench, have a rather rough time at Dean Pound's hands; the reader of old tales is reminded of Mr. Midshipman Easy's treatment of the same, when he returned from sea.

Neither is sympathetic explanation given Maine's undoubtedly important generalization that law (and by implication civilization) is a progress from status to contract. It is so obvious that law sociologically framed and expounded, exists for securing individual contractual rights only so far as society chooses to recognize such rights,—that some excuse for status must be found; sociological law recreates status at once. Dean Pound finds a most ingenious explanation, and a means of avoiding the rather unpleasant word status, in that theory of relations (as of tenant and landlord, master and servant, etc.) which is the feudal element still so vigorous in our legal framework. Nor does he fail (such is his fairness) to see the humour of justifying much modern statute making on principles plainly traceable to a feudal society.

But with due allowance for a reasonable degree of polemics (no one ever wants to let "the Whig dogs have all the best of it") the book is singularly impartial; and very new in analytical form.

The influence on legal interpretation of the Puritan theocrats, and of the pioneers and their frontier, has never before been so adequately shown; and how the frontier generated what another Dean (Wigmore) has called the "sporting theory of justice" is delightfully treated.

A noble and very discriminating tribute too is offered to that long line of judges before the Civil War, who with infinite patience and labor, though often with sad lack of tools, went over the *corpus juris* of England, and selected such parts as seemed to them fitted for American use. Considering how highly all those jurists thought of "the obsolete legal science" of Blackstone, so large an appreciatory garland was hardly to be expected.

The book deserves wide vogue; for the young lawyer there is nothing else that states so concisely, learnedly and on the whole fairly, the now current reasons for the judicial errors of the past; nothing which so briefly and confidently justifies the principles of what (most probably) his professors taught him and are now teaching others; for the intelligent layman it exhibits an understandable method of preferred judicial action, very flattering to the citizen's probable inclination toward the political theory of lawmaking; and a majority of lawyers over about fifty-five, and all who for thirty years have read no more jurisprudence than most hard-working practitioners, ought by all means to read it carefully, in order to discover how singularly obsolete they are, in respect of everything legal except (strange to say) the profitable practice of a profession, whose thinking about fundamentals is asserted to be something as foreign to their professional spirit, as it would have been to that of the neglected Coke, the rejected Blackstone, and the misguided James Coolidge Carter. The final touch of modernity is given to these brilliant essays, by the fact that they were written as the faith of a *Carter* Professor of Jurisprudence.

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THE NATURE AND SOURCES OF THE LAW. By JOHN CHIPMAN GRAY. Second edition, from the author's works, by ROLAND GRAY. New York: THE MACMILLAN Co. 1921. pp. xviii, 348.

As Mr. Roland Gray states in the preface, Professor Gray had before his death made notes in preparation for a second edition of the present work. His desire was, we are told, to put the book into "a form which would reach a larger number of readers." The editor has endeavored to carry out this purpose, both in ways especially indicated by Professor Gray and in others which seemed to the editor adapted to that end. The changes made are not of a fundamental character. A few paragraphs at the beginning of the book have been omitted, several passages have been transposed, and a very limited number of additions made to the text. The changes in the text are all the work of Professor Gray himself and do not in any way alter the general character of the conclusions arrived at in the first edition. In the notes translations are now given of quotations from works in other languages. These will doubtless be of use to some of the wider circle of readers now aimed at. In the notes also will be found references to articles and books which have appeared since the first edition was published.

The points of view expressed by Professor Gray in the work under consideration are, of course, so well known to all serious students of legal science that it is unnecessary to enter into any detailed discussion of them here. One of the most important related, it will be recalled, to the question whether in deciding cases judges exercise a legislative function. About the time Professor Gray wrote the present work there appeared the discussion of that question by Mr. James C.